(39)

Supreme Court of the United States

OCTOBER TERM, 1943

No. 182

SCHIAVONE-BONOMO CORPORATION,
Petitioner,

against

BOUCHARD TRANSPORTATION COMPANY, INC.,
Respondent,

and

BUFFALO BARGE TOWING CORPORATION,
Respondent-Impleaded.

PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT

PAUL SPEER,
Counsel for Petitioner.

CORPORATE PRESS, INC., NEW YORK CITY

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PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice, and the Associate Justices of the Supreme Court of the United States:

The petition of Schiavone-Bonomo Corporation, as owner of two cargoes of scrap iron and steel, respectfully shows to this Court as follows:

This is a petition for a writ of certiorari to review a decision, in admiralty, in the United States Circuit Court of Appeals for the Second Circuit, which reversed the decree of the United States District Court for the Southern District of New York.

The fundamental question involved in this petition is whether a cargo owner who enters into a contract of carriage with a carrier is barred from recovering from the contract carrier, damages sustained by reason of the breach of the contract, by the carrier, solely because the Court

held that the provisions of the New York Statute of Limitations applied, without also applying the limitations and curtailments imposed upon the application of the Statute of Limitations by other statutes of the State, and the asserted law thereof, or is the cargo owner's admitted right of recovery to be limited only by the well-known, long-established admiralty rule of law that there are no statutes of limitation in admiralty, and the doctrine of laches is applied in lieu thereof.

This petition is prayed for because the decision of the Circuit Court of Appeals denying petitioner's right to recover damages for the breach of the contract to transport and deliver, is in conflict with the decisions upon the same point in other Circuits, is in conflict with the law as established by this Court, and is in conflict with the law of the State of New York. The questions involved are of importance, because of their effect on the admiralty law as to the rights and obligations of shippers and carriers, especially in view of present conditions. The Circuit Court of Appeals, in its interpretation and application of a local law, has affected and placed a limitation upon the above-established principles of admiralty law.

The Schiavone-Bonomo Corporation, petitioner, is engaged in the scrap iron business, and at the time the contract involved was made, had a place of business in the City of New York, as did the other parties to this action.

It was the owner of the two cargoes of scrap iron and steel involved in this action, and which were laden on board the barges *B. M. Baker* and *Charles C. Ryan.*

On September 26, 1936, petitioner entered into a written contract of carriage with the Bouchard Transportation Company (Exhibit A, R-5), whereby the latter agreed to transport and deliver petitioner's cargoes of scrap iron and steel from alongside dock at port of loading to alongside dock at Buffalo, New York. Pursuant to this contract, petitioner's cargoes were placed on the two barges for

transportation and delivery, and they, together with several other barges, were taken in tow by a tug. The barges and tug were furnished by the carrier pursuant to contract.

During the course of the voyage, the tow struck the center abutment of a railroad bridge that crosses the New York State Barge Canal at Clyde, New York, and the two barges, with petitioner's cargoes aboard, were sunk, and the voyage abandoned. Petitioner, through its representatives, raised the cargoes, which of course, were not damaged by reason of contact with water, carried them forward to Buffalo, New York, and delivered them to the consignee. On July 10, 1940, which date was more than three years after the cause of action arose, petitioner instituted an action on the contract against Bouchard Transportation Company, Inc., seeking to recover the extra expense it incurred in raising and carrying forward the cargoes, by reason of the breach and abandonment by the carrier, of its contract to transport and deliver the cargoes.

The Bouchard Transportation Company, Inc., then appeared and filed its answer to the libel, together with a petition filed pursuant to the 56th Rule in Admiralty, impleading Buffalo Barge Towing Corporation, upon the ground that if there was any responsibility to the petitioner, it was that of Buffalo Barge Towing Corporation, because this latter company had made an exactly similar contract with Bouchard Transportation Company, Inc. on September 24, 1936 (Exhibit A, R-18), as Bouchard Transportation Company had made with petitioner on September 26, 1936. The contract made between Bouchard Transportation Company and Buffalo Barge Towing Corporation was unknown to petitioner.

The Buffalo Barge Towing Corporation appeared and filed exceptions to the libel and impleading petition (R-20), on the ground that by reason of laches, recovery could not be had against it. The exceptions were overruled in the United States District Court for the Southern District of

New York (R-21), on the ground that it was not shown that libellant was guilty of laches, in that the two elements necessary to sustain the defense of laches, namely: delay and prejudice, were not shown. The Court further held that if any statute of limitations was to be applied by analogy, it should be that dealing with contract which allows six years within which to bring an action. The Court further held that the application by analogy of a statute of limitations is only an analogy and not a rule.

Buffalo Barge Towing Corporation then filed its answers to the libel and impleading petition, setting up, among other defenses, the defense of laches, claiming not only delay, but prejudice.

Bouchard Transportation Company, Inc., has at no time offered as a defense to petitioner's libel the defense of laches, or claimed that the New York State Statute of Limitations with respect to damage to property caused by negligence, should be applied.

The action came on for trial before the Honorable JOHN BRIGHT, Judge of the District Court for the Southern District of New York. At the trial respondents were afforded the opportunity to offer full and complete defenses, did not make any contention, or offer any proof that they had been prejudiced by the delay of petitioner, in the commencement of the suit. After trial the District Court delivered an oral opinion (R-90-92), and made findings of fact and conclusions of law (R-92-97), wherein the Buffalo Barge Towing Corporation was held primarily responsible for loss sustained, and Bouchard Transportation Company, Inc., secondarily responsible by reason of its breach of contract. It was further held that the petitioner was not guilty of laches, and that if any New York statute of limitations should be applied by analogy, it should be the six-year statute covering contracts.

An interlocutory decree was entered in accordance with said decision, and Buffalo Barge Towing Corporation

appealed from the decree solely with respect to the defense of laches, abandoning its defense on the merits, together with its other defenses. The Bouchard Transportation Company, Inc. did not appeal from or file cross-assignments of error to the decree holding it responsible to the petitioner.

The Circuit Court of Appeals reversed the decision of the District Court, dismissed petitioner's libel and the impleading petition.

The only question argued on the appear was whether or not petitioner was guilty of laches in so far as Buffalo Barge Towing Corporation was concerned.

Your petitioner presented a petition to the Circuit Court of Appeals asking for a rehearing so that the question of the point on propriety of the dismissal of the libel as to Bouchard Transportation Company, and which had never been argued before the Circuit Court of Appeals, might be heard. The Circuit Court of Appeals, after requesting briefs on certain questions, denied this petition.

The decision of the Circuit Court of Appeals as it now stands, is in conflict with this Court, the decisions in other Courts, and the law of the State of New York, and petitioner never had its day in Court, so far as it concerns the ground upon which the petition for rehearing was denied.

Dated: New York, N. Y., July 19, 1943.

SCHIAVONE-BONOMO CORPORATION,

By.....

By PAUL SPEER

Counsel.

State of New York, }
County of New York, } ss.:

PAUL SPEER, being duly sworn, deposes and says:

That he is counsel for the petitioner, Schiavone-Bonomo Corporation, and is familiar with the facts of this case; that he has read a copy of the transcript of record which accompanies this petition, being the transcript of record in the case at bar, and that he has carefully examined the foregoing petition for a writ of certiorari; that the allegations and matters stated in said petition are true to the best of his knowledge, information and belief, and that in his opinion, the petition is well-founded, and is one in which the prayer of the petitioner should be granted by this Court.

PAUL SPEER.

Sworn to before me this
19th day of July, 1943.

JOHN F. QUARTO,
Notary Public,
(Seal) Nassau County No. 1332.
N. Y. Co. Clk's No. 4—Reg. No. 4 Q 3.
Kings Co. Clk's No. 7—Reg. No. 4002.
Comm. expires March 30, 1944.

SUPREME COURT OF THE UNITED STATES.

SCHIAVONE-BONOMO CORPORATION,
Petitioner,
against
BOUCHARD TRANSPORTATION COMPANY, INC.,
Respondent,
and
BUFFALO BARGE TOWING CORPORATION,
Respondent-Impleaded.

BRIEF IN SUPPORT OF PETITION

Schiavone-Bonomo Corporation, petitioner, made a contract with Bouchard Transportation Company to transport two cargoes of scrap iron and steel from two ports in New York to the Port of Buffalo, New York. This contract to transport and deliver goods, constituted a contract of affreightment even though there was a towage service connected therewith.

> *Sacramento Navigation Company* v. *Salz,* 273 U. S. 326.

The Bouchard Transportation Company, apparently not having available equipment to carry out the contract it made with petitioner, entered into a contract with the Buffalo Barge Towing Corporation. This latter company furnished the barges and the tug which were to transport and deliver libellant's cargoes.

After the cargoes were placed aboard the barges, and during the course of the voyage, due to the faulty navigation of the tug and the barges, the tow struck the center abutment of a railroad bridge at Clyde, New York, on October 24, 1936. The contract of carriage, in so far as these

two sunken barges were concerned, was abandoned by the carrier, and the petitioner, through its representatives, raised the cargoes and carried them forward to destination, without the cargoes themselves being damaged. The petitioner was, however, required to incur extra expense in transporting the cargoes by reason of the breach of the contract by the carrier.

The petitioner instituted an action against Bouchard Transportation Company to recover the damages sustained, and this company sought to avoid liability by showing that it had made similar contracts with the Buffalo Barge Towing Corporation. It at no time has claimed that the petitioner was guilty of laches, nor that it had been prejudiced by any delay.

When the Buffalo Barge Towing Corporation appeared in the action, it offered the defense of laches, claiming that the following New York State statutes of limitation should be applied by analogy:

> "S 49. Actions to be commenced within three years. The following actions must be commenced within three years after the cause of action has accrued:
>
> "1. * * *
>
> * * * * * * * * *
>
> "6. An action to recover damages for an injury to property, or a personal injury, resulting from negligence.
>
> "7. An action to recover damages for an injury to property, except in the case where a different period is expressly prescribed in this article."

It is petitioner's contention that if, after showing prejudice by reason of delay, any New York State statute of limitations is to be applied by analogy, it should be one that deals with actions to be commenced within six years, which is as follows:

"S 48. Actions to be commenced within six years. The following actions must be commenced within six years after the cause of action has accrued:

"1. An action upon a contract obligation express or implied, except a judgment or sealed instrument.

"2. * * *"

Upon the trial the respondents were able to produce all of their evidence, and made no contention of any prejudice by reason of delay. The status, rights, and obligations of the party were the same at the time of the trial of the action as they were at the time of the breach of the contract.

This action was brought *in personam*. Therefore, it did not seek to impose a lien on any vessel, which lien, it might be contended, would interfere with the rights of a third party. The District Court, both on its decision with respect to the exceptions filed to the libel and impleading petition, and on the trial of the action, found, as a fact, that none of the parties had been prejudiced by delay, and therefore the defense of laches had not been proved.

After the entry of the interlocutory decree, Buffalo Barge Towing Corporation, took an appeal solely from the decree on the question of the defense of laches (R. 100). Bouchard Transportation Company, Inc., did not take an appeal from the decree or file any cross-assignments of error as it was required to do by Rule XXXVIII of the Circuit Court of Appeals.

The Circuit Court of Appeals has held that the petitioner is barred from making recovery from either party by reason of the fact that the action was governed by the three-year statute of limitation of the State of New York, disregarding the equities and justice of the case, and whether or not either of the respondents had been prejudiced, which is contrary to the long and well-established rule respecting the defense of laches. In further applying

the New York State statute of limitation, it disregarded the requirements imposed by the laws of the State of New York before a defense of the statute of limitation can be available, as well as the defense of laches.

POINT I.

The decision of the Circuit Court of Appeals in holding that the petitioner could not recover because of the New York Statute of Limitations, and without consideration of the elements of the defense of laches, is in direct conflict with the decisions of this Court and the decisions in other circuits.

There can be no dispute as to the well-known rule that there are no statutes of limitation in admiralty, and that the doctrine of laches is applied in lieu thereof.

In the present case, Buffalo Barge Towing Corporation interposed the defense of laches, setting forth the delay of the petitioner, and claiming that they were prejudiced in their rights. On the trial of the action they had the opportunity to offer a full and complete defense, and there was no evidence offered or contention made that they or the Bouchard Transportation Company, Inc., were prejudiced in any way by delay of the petitioner.

It has long been established in all of the Federal courts, that in considering the defense of laches, delay in and of itself is not sufficient to establish the defense, but it must be shown that together with the delay, the party offering the defense has been prejudiced or its status affected in some manner or other.

This action was brought *in personam,* and the petitioner did not seek to impose a lien upon any vessel of either of the respondents. In an action *in rem,* wherein a lien was sought to be imposed, this Court laid down the rule with respect to the defense of laches. In such an

action it is quite possible that the rights of third parties might be affected. There is no such possibility in an action brought *in personam,* such as was brought in the present case.

In *The Key City,* 14 Wall. 653, action was brought by a cargo owner against the carrying vessel, seeking to impose a lien upon the vessel by reason of its failure to deliver cargo. The defense of laches was interposed, and Mr. Justice MILLER, at page 659, in delivering the opinion of this Court, said:

> "The authorities on the subject of lapse of time as a defense to suits for the enforcement of maritime liens are carefully and industriously collected in the briefs of counsel on both sides, to which reference is hereby made, without specifying them more particularly. We think that the following propositions, as applicable to the case before us, may be fairly stated as the result of these authorities: (1) That, while the courts of admiralty are not governed in such cases by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens will under proper circumstances, constitute a valid defense. (2) That no arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must, in every case, depend upon the peculiar equitable circumstances of that case. (3) That where the lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under a shorter time, and a more rigid scrutiny of the circumstances of the delay, than when the claimant is the owner at the time the lien accrued" (p. 189).

This rule has been consistently followed and observed by the Federal courts in the application of the defense of laches.

The Circuit Court of Appeals for the Second Circuit

followed this rule in the case of *Stiles* v. *Ocean Steamship Co.*, 34 Fed. (2d) 627 (C. C. A. 2), and held as follows:

> "Last of all, defendant relies on the defense of laches. It is true that there was great delay in bringing suit, but there is no proof that the respondent was unduly prejudiced. * * * There has been no showing here that witnesses have disappeared. We can discover no reason for holding laches a bar which would not apply to almost any suit that had not been brought for three or four years after the cause of action arose. Respondent may have thought that Stiles & Co. had delayed so long that it had dropped its claim, but this circumstance alone cannot limit the latter's right."

Various other Circuits and District courts have also for many years laid down this rule.

THIRD CIRCUIT

This rule has been laid down by the Third Circuit in the case of *Loverich* v. *Warner Co.*, 118 Fed. (2d) 690 (C. C. A. 3).

FIFTH CIRCUIT

This Circuit laid down the same rule in the case of *The Gertrude*, 38 Fed. (2d) 946; 1930 A. M. C. 823 (C. C. A. 5).

NINTH CIRCUIT

This same rule was again set forth by this Circuit in the case of *Pacific Coast S. S. Co.* v. *Bancroft-Whitney Co.*, 94 Fed. 180 (C. C. A. 9).

It is also set forth in the District Court of the Eastern District of Louisiana, in the case of *Coburn* v. *Factors' & Traders Ins. Co.*, 20 Fed. 644, and in the case of *Texas Co.* v. *Steamtug Independent*, 37 Fed. Supp. 106; 1941 A. M. C. 524, reversed on other grounds, 122 Fed. (2d) 141 (C. C. A. 5).

In *Pan-American Trading Co.* v. *Franquiz*, 8 Fed. (2d) 500 (C. C. A. 9), the District Court for the Southern District of Florida, again set forth the same rule.

In *Great Lakes Transportation Co.* v. *Hand & Johnson Tug Line,* 289 Fed. 130, the District Court for the Eastern District of Michigan, again set forth the same rule.

From the cases heretofore enumerated, it appears that the law with respect to the defense of laches has been not only established for some time, but has been clearly set forth by numerous Federal courts.

In the present case, the Circuit Court of Appeals for the Second Circuit has, by its decision, changed the well-known doctrine of laches, and is now in conflict with the law as laid down by this Court, as well as other Circuit courts and District courts.

Neither the Buffalo Barge Towing Corporation, which offered the defense of laches, nor the Bouchard Transportation Company, Inc., which did not interpose the defense, have at any time, either during the trial or on the appeal to the Circuit Court of Appeals, contended that they were in any way prejudiced by any delay, or was their status with respect to this claim changed by reason of the delay.

Prior to the decision in the present case, the Circuit Court of Appeals for the Second Circuit clearly expressed itself with respect to the defense of laches and delay, in the case of *The Fulton,* 54 Fed. (2d) 467; 1932 A. M. C. 232 (C. C. A. 2). In that case the Court held that there had been an extraordinary delay, as the libel to recover damage to property was filed more than four years after the collision, which occurred nearly ten years before the decision. The Court stated as follows:

> "* * * In spite of the absence of any explanation, we cannot see that the delay *ipso facto* should defeat the claim. Although one of the claimant's witnesses died before trial, this was misfortune whose consequences cannot be pressed so far. The decree gives interest only from its date as we understand it; this is all the penalty we can impose" (p. 236).

POINT II.

If a New York State Statute of Limitation is to be applied by analogy, it should be the one governing contract actions, as in applying the doctrine of laches in admiralty, an analogy to a state statute of limitations is only an analogy and not a rule.

The Circuit Court of Appeals, in applying the New York three-year statute, is in conflict with other Circuits.

Federal courts have repeatedly held that a private carrier is free to enter into any contract which it may deem fit, and that his rights and obligations are determined by the contract.

That the rights and obligations of the parties to this action are based on contract, is shown by the case of *Commercial Molasses Corporation* v. *New York Barge Corporation,* 314 U. S. 104. In that case damages were sought by reason of the breach of the contract of carriage by a private carrier which owned the carrier vessel, and which resulted in a loss and damage to cargo. This Court held that the duties of the parties were based on the contract as follows:

> "But as the court below held, the bailee of goods who has not assumed a common carrier's obligation is not an insurer. His undertaking is to exercise due care in the protection of the goods committed to his care and to perform the obligation of his contract including the warranty of seaworthiness when he is a shipowner. In such a case the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of recovery which he seeks."

The Bouchard Transportation Company contracted with petitioner to transport and deliver at Buffalo, New York, petitioner's cargoes. When the barges on which petitioner's cargoes were laden sunk in the New York State Barge Canal, the Bouchard Transportation Company abandoned

the voyage and the contract. In order for the petitioner to have the cargoes delivered at destination as was contemplated and provided by the contract, it was necessary that the petitioner raise and transport the cargoes to destination. It was solely due to the breach of contract that the petitioner was required to incur this extra expense, and if any statute is to be applied by analogy, disregarding for the time being that no one was prejudiced, it is submitted that the statute governing contract actions is the one to be considered.

In *The Kermit,* 76 Fed. (2d) 363 (C. C. A. 9), an action was brought by a cargo owner against the carrier vessel for damages sustained by cargo. The defense of laches was interposed, and the Court held as follows:

> "As the decisions indicate, the question of laches is addressed to the sound discretion of the trial judge, and his decision will not be disturbed on appeal unless it is so clearly wrong as to amount to an abuse of discretion.
>
> * * * * * * * *
>
> "The California Code of Civil Procedure, S 337, provides that an action on a contract obligation or liability founded upon an instrument in writing must be commenced within four years. The District Court, by analogy, adopted the statute in determining that libellants were guilty of laches."

This case shows that the Ninth Circuit has clearly held that in a contract of carriage by water, where action is brought by the cargo owner for a breach thereof, any State statute of limitations to be applied by analogy is that statute which governs action by contract.

The holding of the Circuit Court of Appeals in the present case is in conflict with the holding of the Ninth Circuit in *The Kermit.*

The Circuit Court of Appeals for the Second Circuit, considering the question of the limitation of time within which to bring an action, set forth the law, with respect

to a breach of contract of carriage by a water carrier and the abandonment of the voyage, in the case of *Corporation of the Royal Exchange Insurance* v. *United States, et al.*, 75 Fed. (2d) 478. In that case the Court, quoting Prof. Williston, held:

> " 'A distinction between unexcused inability to perform and willful intention not to perform is not of practical value. As far as performance of the contract is concerned they are of equal effect and should be followed by the same consequences.' "

In considering whether or not the carrier may take advantage of a State statute of limitation, it is necessary to consider the rights of such a carrier to take advantage of a limitation statute such as the Harter Act or the Limitation of Liabilities Statutes, both of which are Acts of the United States. This Court has held that a private carrier is free to make such terms as it may agree upon, and its rights and obligations are dependent upon the contract. Under the private carrier's contract, the carrier warrants seaworthiness of the vessel. This warranty is part of the personal contract, whether it is expressly incorporated in the contract or not. If a private carrier desires to have the benefit of the Harter Act, he must so provide in the contract of carriage, and this right is dependent solely upon the contract. If the private carrier does so provide in his contract, and fails to use due diligence to make his vessel seaworthy, then he would be guilty of negligence. However, the reason that he is denied the benefits of the Harter Act depends upon his contract.

This was held in the case of *Koppers Connecticut Coke* v. *James McWilliams Blue Line, Inc.*, 89 Fed. (2d) 865 (C. C. A. 2), certiorari denied 302 U. S. 706, 82 L. Ed. 545.

In cases involving private carriers' rights to limit liability, it has been consistently held that where there is a breach of warranty of seaworthiness, either implied or express, the carrier cannot limit its liability. The reason

for the denial of right of limitation of or exoneration from liability, is based upon the breach of the personal contract of the carrier. This rule has been laid down and following in the following cases:

Cullen 32, 62 Fed. (2d) 68 (C. C. A. 2); affirmed 290 U. S. 82, 78 L. Ed. 189;
The Loyal, 204 Fed. 930 (C. C. A. 2);
The Jungshoved, 290 Fed. 733 (C. C. A. 2), 1923 A. M. C. 630.

The rights of limitation of liability of a carrier sought in these cases was dependent solely upon the contract of carriage. Therefore, it should follow that the right to escape liability by reason of a State statute of limitations, is also dependent upon the contract.

From a reading of the New York State Statutes of Limitations with respect to actions which should be commenced within three years, and those which should be commenced within six years, it can be readily seen that the legislature intended that any action upon a contract obligation, express or implied, should be begun within six years, and by the way the words "contract obligation" as set forth in the statute, it would appear that the word "obligation" included duties imposed by contract and law, irrespective of whether or not the breach of obligation included negligence. That this must be so is shown by Section 49 of the New York Civil Practice Act. That section simply provides that it is not to apply in a case where a different period is expressly prescribed in the article. The article expressly provides for damages or injuries to property, or for damages resulting from a breach of a contract obligation, whether express or implied.

The three-year statute of limitation which the Circuit Court of Appeals has found applies to the present case has reference to damage for injury to property. In the present case the property involved, which was the cargoes

of scrap iron and scrap steel, were not damaged by its contact with water. Petitioner, however, was damaged by reason of the extra expense which it was caused to incur by reason of the abandonment of the voyage and the contract by the carrier. The Circuit Court of Appeals in its opinion has referred to this contention of the petitioner. It also sets forth the statute of New York which defines injury to property, and then finds that through the acts of the New York State legislature, this definition is not to apply to the New York Civil Practice Act. They then hold that they have no hesitation in finding that the sunken scrap iron was an injury to property. They are correct in one circumstance, in that the barge was damaged, but as was testified to by petitioner's witnesses, the property was not damaged or injured.

POINT III.

The application by the New York State Statute of Limitations by the Circuit Court of Appeals is in conflict with the law of the State of New York, as well as with the laws of the Federal courts.

That the New York State Statute of Limitations in and of itself did not extinguish libellant's cause of action, is clear, and that the Statute of Limitations as applied by the Circuit Court of Appeals, assuming that they applied the correct one, is merely a statute of repose is shown by the following cases:

> *Campbell* v. *Holt,* 115 U. S. 620; 29 L. Ed. 483;
> *Hulbert* v. *Clark,* 128 N. Y. 295.

Before a party may have the benefit of the New York Statute of Limitations, it must plead it as a defense. This requirement is not only made by the New York Civil Practice Act, but by the laws of the State of New York. It was

not so pleaded by Bouchard Transportation Company, Inc.

The New York Civil Practice Act provides by Sections 242 and 261 as follows:

> "S. 242. CERTAIN FACTS TO BE PLEADED. The defendant or plaintiff, as the case may be, shall raise by his pleading all matters which show the action or counterclaim not to be maintainable, or that the transaction is either void or voidable in point of law, and all such grounds of defense or reply, as the case may be, which if not raised would be likely to take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, statute of limitations, release, payment, facts showing illegality either by statute, common law or statute of frauds. The application of this section shall not be confined to the instances enumerated. (New.)"

> "S. 261. CONTENTS OF ANSWER. The answer of the defendant must contain:
>
> 1. A general or specific denial of each material allegation of the complaint controverted by the defendant, or of any knowledge or information thereof sufficient to form a belief.
>
> 2. A statement of any new matter constituting a defense or counterclaim. (As amended by L. 1921, ch. 372, October 1. Code S. 500.)"

That a statute of limitations is not available as a defense unless it is pleaded, has been consistently held by the courts of the State of New York, as well as the Federal courts of the United States, in the following cases:

Sanger v. *Nightingale,* 122 U. S. 176, 30 L. Ed. 1105;

Gill v. *Frances Inv. Co.,* 19 F. (2d) 880 (C. C. A. 9);

Green Star S. S. Co. v. *Nanyang Bros. Tobacco Co.* (C. C. A. 9) 3 F. (2d) 369;

American Linseed Co. v. *Norfolk & North American Steam Shipping Co. Ltd.*, 32 F. (2d) 281;
United States v. *Alex Dussel Iron Works, Inc.*, 31 F. (2d) 535 (C. C. A. 5);
American Merchant Marine Ins. Co. of N. Y. v. *Tremaine*, 269 Fed. 376 (C. C. A. 9);
Lindlots Realty Corp. v. *Suffolk County*, 278 N. Y. 45;
Locke v. *Pembroke*, 280 N. Y. 430;
Nasaba Corp. v. *Harfred Realty Corp.*, 287 N. Y. 290;
Douglass v. *Ferris*, 138 N. Y. 192;
Selegson v. *Weiss*, 227 N. Y. S. 338, 222 App. Div. 634.

That the statute is waived unless pleaded, is specifically shown by the following cases:

Liquid Veneer Corp. v. *Smuckler*, 90 F. (2d) 196 (C. C. A. 9);
Supreme Forest Woodmen Circle et al. v. *City of Belton, Tex.*, 100 F. (2d) 655 (C. C. A. 5);
Rich v. *Bray*, 37 Fed. 273 (C. C. Mo.);
Bartles v. *Gibson*, 17 Fed. 293 (C. C. Wis.);
In re Southshore Cooperative Assn., 23 Fed. Sup. 743; affirmed 103 F. (2d) 336 (C. C. A. 2);
Hayden v. *Pierce*, 144 N. Y. 512;
Hamilton v. *Royal Insurance Co.*, 156 N. Y. 327;
Dunkum v. *Maceck Bldg. Corp.*, 237 N. Y. S. 180, 227 App. Div. 230;
Richardson v. *Gregory*, 219 N. Y. S. 397, 219 App. Div. 211; affirmed 245 N. Y. 540.

The defense of the statute of limitations may not be raised for the first time on appeal.

Retzer v. *Wood*, 109 U. S. 185, 27 L. Ed. 900;
Bardon v. *Land & River Improvement Co.*, 157 U. S. 327, 39 L. Ed. 719, affirming 45 Fed. 706;
Ferryboatmen's Union of California v. *Northwestern Pacific R. R. Co.*, 84 F. (2d) 773 (C. C. A. 9);
Ashton v. *Glaze*, 95 F. (2d) 427 (C. C. A. 9);
Provident Life & Trust Co. of Philadelphia v. *Camden & T. Ry. Co.*, 177 Fed. 854 (C. C. A. 3);
Johnsonburg Vitrified Brick Co. v. *Yates*, 177 Fed. 389 (C. C. A. 3);
Faburn v. *Dimon*, 47 N. Y. S. 227, 20 App. Div. 529;
City of New York v. *Coney Island Fire Dept.*, 18 N. Y. S. (2d) 923; affirmed 285 N. Y. 535;
Lindlots Realty Corp. v. *Suffolk County*, 296 N. Y. S. 599, 251 App. Div. 340, affirmed 278 N. Y. 45.

The same ruling also applies to the defense of laches.

Ashton v. *Glaze*, 95 F. (2d) 427 (C. C. A. 9);
Ferryboatmen's Union of California v. *Northwestern Pacific R. R. Co.*, 84 F. (2d) 773 (C. C. A. 9);
American Merchant Marine Ins. Co. of N. Y. v. *Tremaine*, 269 Fed. 376 (C. C. A. 9);
Douglass v. *Ferris, et al.*, 138 N. Y. 192;
Selegson v. *Weiss*, 227 N. Y. S. 338, 222 App. Div. 634.

From the foregoing, the respondent-appellee, Bouchard Transportation Company, Inc., cannot now claim that the libellant's action and right of recovery is barred by the Statute of Limitations or laches. When the libel was dis-

missed as to the Buffalo Barge Corporation, then the Bouchard Company became primarily liable.

In *The Tommy,* 39 F. (2d) 577 (C. C. A. 2), an action was brought by a lighter owner against the charterer to recover damages caused to the lighter while under charter.

The charter impleaded the stevedore alleging that the stevedore company was responsible for the damage. The District Court entered a decree primarily against the stevedore company and secondarily against the charterer of the scow by reason of its failure to return the scow in the same condition as when received. The Court modified the decree of the District Court and exonerated the stevedore and company and held the charterer liable primarily. The Court held in a *per curiam* opinion at page 578, as follows:

> "The contract of hire imposed liability on the Cummings Lighterage & Transportation Company for failure to return the barge in as good condition as received, ordinary wear and tear excepted, and it was held for breach thereof below. It has not appealed. Reversing the decree against the Chiarello Stevedoring Company, Inc., imposes primary liability upon it.
>
> "The decree will be reversed as to the defendant the Chiarello Stevedoring Company, Inc., and the Cummings Lighterage & Transportation Company now becomes primarily liable for the damages.
>
> "Decree modified.
>
> "On Motion for Rehearing.
>
> "PER CURIAM.
>
> "Edward E. Cummings has moved for a rehearing on the ground that the record cannot sustain the decree against him and that he has had no day in court upon the issue decided.
>
> "The decree appealed from adjudged that the libellant recover its damages primarily of Chiarello Stevedoring Company and secondarily of Cummings. The opinion of the District Court found, in accordance with the allegation of the libel, that by the

terms of the charter Cummings agreed to return the barge at the termination of the charter agreement in the same order and condition as received, ordinary wear and tear excepted. This finding was doubtless based upon a stipulation, as no evidence was introduced as to the terms of the charter. The stipulation reads:

" 'Incorporation and ownership and the charter in good condition and return in damaged condition is admitted by all parties on the record.'

"Cummings now says that the allegation of the libel as to the contract of hire was neither litigated nor proved. But he made no motion in the court below to be relieved of his stipulation, and, although a decree had gone against him, he took no appeal, assigned no errors in this court, and filed no brief. He was apparently willing to allow the decree against him to stand, however erroneous, in the expectation that the stevedoring company would have to pay it. Being disappointed in that expectation he asks, after it has been affirmed, for a retrial. We think the request comes too late. Rule 37 requires an appellee who desires other relief than that granted by the decree to file an assignment of errors. No adequate reason is advanced for not enforcing the rule in the present case."

LASTLY.

It is respectfully submitted that a writ of certiorari should be issued to review the decision of the Circuit Court of Appeals for the Second Circuit in this case.

PAUL SPEER,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 182

SCHIAVONE-BONOMO CORPORATION,
Petitioner,

against

BOUCHARD TRANSPORTATION COMPANY, INC.,
Respondent,

and

BUFFALO BARGE TOWING CORPORATION,
Respondent.

BRIEF FOR BUFFALO BARGE TOWING CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

The opinion below, Judge Learned Hand writing with the concurrence of Judges Clark and Frank, is reported in 132 F. 2d 766, and appears at page 104 of the record. The *per curium* opinion upon denial of the petitioner's motion for a rehearing is reported in 134 F. 2d 1022; R. 116.

Statement

Petitioner sued in the admiralty to recover from a private carrier the damages occasioned by the sinking of two barges on which the petitioner's cargo was being trans-

ported between points on the New York Barge Canal. The sinking resulted from a collision with a bridge abutment during foggy weather.

Pursuant to the 56th Admiralty Rule, the carrier which the petitioner had sued, Bouchard Transportation Company, impleaded another, Buffalo Barge Towing Corporation. As the Rule provides, the cause thereupon proceeded as if the impleaded carrier had been originally sued by the petitioner. After a trial on the merits the district court found that the petitioner's loss was attributable to the negligence of the impleaded carrier, and held it primarily liable for the petitioner's damages, and the other carrier secondarily liable.

Only the impleaded carrier appealed, and it did so on the sole ground that the libel should have been dismissed for laches, a defense which the impleaded carrier had unsuccessfully raised in the district court, first by exceptions to the libel and the impleading petition (R. 20), and then by way of answer (R. 26).

The Circuit Court of Appeals sustained the defense and dismissed the petitioner's libel, holding that at the time when the libel was filed the three-year statute of limitations precluded an action at law on the petitioner's demand, and that in the absence of justification or excuse for the petitioner's delay the statute would be followed in the admiralty also (R. 105).

By a motion for a re-hearing the petitioner sought to have the Circuit Court of Appeals so modify its decision that the dismissal of the libel on the appeal of the carrier held primarily liable would nevertheless permit the petitioner to recover from the carrier held secondarily liable (R. 108). The latter had not appealed or filed an assignment of errors, and in the district court it had not pleaded the statute of limitations or laches; but in its brief on appeal it had asked leave to adopt those pleas if the court should sustain them at the behest of this respondent, the formal appellant in the court below (cf. R. 105, item 5). After

briefs had been called for and submitted, the petitioner's motion for a reargument was denied, and the libel was ordered to stand dismissed as against both of the respondents here (R. 116).

The Questions Presented

In the court below there was a question whether the petitioner might defeat the three-year statute of limitations by suing in contract instead of in tort. That question was answered in the negative, the court holding that according to the law of New York an action on the petitioner's demand was barred by the three-year statute irrespective of the form in which the demand might be asserted. Not a single state court decision is cited by the petitioner in support of its faint contention here that the Circuit Court of Appeals has misunderstood the state law on that point. The numerous state court decisions cited in the petitioner's brief, Point III, pages 18-21, deal entirely with the procedural methods prescribed by New York law for raising the defense of the statute of limitations,—a matter with which the admiralty courts, having their own procedure, are not even remotely concerned (cf. *The Gazelle*, 128 U. S. 474, 487).

Under Point I of its brief, pages 10-13, the petitioner refers to the cases of maritime liens, and asserts that suits *in personam* similar to this suit have been entertained in the admiralty after the lapse of more than three years. The maritime lien cases are in a class by themselves, and they call for no discussion here; the other cases mentioned by the petitioner, insofar as they resemble this one, involved limitation statutes that gave a longer time for taking action than is permitted by the present New York law. When the court below decided the case of *Stiles* v. *Ocean S. S. Co.*, 2 Cir., 34 F. 2d 627, from which the petitioner has quoted, page 12, and the case of *The Fulton*, 2 Cir., 54 F. 2d 467, quoted on page 13, the applicable statute allowed six years for suit. The period was shortened to three years before

the petitioner's cause of action accrued. Incidentally, the petitioner's suggestion that the court below has departed from the rule it followed in the *Stiles* case, *supra,* must be laid to oversight of the following sentence from the opinion in that case, although the omission of the sentence from the quotation on page 12 of the petitioner's brief is chastely disclosed by three asterisks:

> "Courts of admiralty apply the state statute of limitations in determining whether a claim is barred, unless some exceptional circumstances exist."

Under Point II, pages 14-17, the petitioner contends in effect that the admiralty should apply by analogy a statute of limitations different from the one that would govern an action at law on the same demand. No authority is cited for that extraordinary view.

As already noted, the petitioner's Point III involves a purely procedural objection, that the Circuit Court of Appeals excused the neglect of the respondent Bouchard Transportation Co., Inc., to set up the defense of laches as this respondent had done. The court's decision to relieve that respondent of the consequence of its oversight does not directly concern this respondent.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

JOHN C. CRAWLEY,
Counsel for BUFFALO BARGE TOWING CORPORATION, *Respondent.*

New York, September 7, 1943.

(41)

Supreme Court of the United States

OCTOBER TERM, 1943

No. 182

SCHIAVONE-BONOMO CORPORATION,

Petitioner,

against

BOUCHARD TRANSPORTATION CO., INC.,

Respondent,

BUFFALO BARGE TOWING CORPORATION,

Respondent-Impleaded.

BRIEF ON BEHALF OF RESPONDENT BOUCHARD TRANSPORTATION CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE PRESS, INC., NEW YORK CITY

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BRIEF ON BEHALF OF RESPONDENT BOUCHARD TRANSPORTATION CO., INC., IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Statement.

As the statement of facts in the petition of Schiavone-Bonomo Corporation are not quite in accord with the evidence, it is deemed important to this respondent that they be reviewed briefly.

As an accommodation to its customer, Schiavone-Bonomo Corporation, Bouchard Transportation Co. Inc., arranged with Buffalo Barge Towing Corporation for the transportation of two cargoes of scrap iron from Troy and Fort Edward, N. Y. to Buffalo, N. Y. There was uncontradicted testimony that no compensation whatever was paid to Bouchard by either of the other two parties and that Bouchard had made clear to Buffalo Barge that it was merely passing on the business to Buffalo Barge

and wanted to secure for its customer the best possible rate, without any commission or other remuneration for itself from the transaction. The assistant treasurer of Schiavone-Bonomo admitted that nothing was paid by his company to Bouchard and that the bills for freights were sent by Buffalo Barge to, and were accepted by petitioner. Bouchard had nothing to do with the arrangements for furnishing the barges or tugs for the transportation or with the loading of the cargoes. No claim was ever asserted against it by Schiavone-Bonomo until the filing of the libel more than three years after the transaction was completed. The statement of the transaction made by Bouchard's counsel at the opening of the trial was readily conceded by counsel for Buffalo Barge.

The case proceeded as one in contract between the petitioner and the respondent-impleaded, Buffalo Barge Towing Corporation. Petitioner rested on proof that the cargoes were delivered to the barges furnished by Buffalo Barge pursuant to its contract of transportation and that delivery was not made at Buffalo. Buffalo Barge then adduced proof in explanation of its failure to deliver.

Notwithstanding the proof that Bouchard was acting merely as agent for petitioner, the District Court found that there was a breach of contractual obligation to deliver not only by Buffalo Barge, but also by Bouchard and that Buffalo Barge was primarily liable and Bouchard secondarily liable for such breach.

Upon appeal to the Circuit Court of Appeals, the petitioner made no claim before that Court inconsistent with the position it had always previously assumed, namely, that the litigation and the contract out of which it arose was one between the petitioner and the respondent-impleaded, Buffalo Barge Towing Corporation. In its appeal brief in the Circuit Court, the petitioner, after arguing at length that Buffalo Barge was a private carrier of petitioner's

cargo and that, therefore, the limitation section for contract actions applied, concluded its argument with the words:

> "The damages sought in this case are solely those sustained by the libellant due to the carrier's breach and abandonment of its contract of carriage. * * * The damages sought are those for which the appellant (Buffalo Barge) is responsible for under its contract."

By its decision the Circuit Court of Appeals concluded that a relationship of contract existed between the petitioner and Buffalo Barge Towing Corporation, since it wrote:

> "We assume from the conduct of the parties that one existed and we dispose of the case on the assumption that the Barge Corporation was acting as a private carrier for the libellant (petitioner) at the time of the loss" (p. 106 of Transcript).

Thus the Circuit Court noticed the error of the District Court in holding Bouchard secondarily liable as a carrier instead of finding it to be a mere agent, which it really was, and corrected the error accordingly. The expression used by the Circuit Court squared exactly with the conduct of the parties and their proctors until after its decision when, in the petition for rehearing, for the first time the petitioner argued that its contract was not with Buffalo Barge, but with Bouchard.

At page 3 of the petition for the writ of certiorari the statement is made:

> "The contract made between Bouchard Transportation Co. Inc. and Buffalo Barge Towing Corporation was unknown to petitioner."

A reading of the testimony in the District Court will show that the petitioner was fully conversant with all of

the circumstances under which the carriage of its cargoes was arranged with Buffalo Barge. Plainly enough, Bouchard as an accommodation to petitioner and without deriving any compensation or other benefit, was innocently endeavoring to assist the very party who, upon the rehearing and here, seeks to cast it in damages. At no time until the application for a rehearing, was it indicated that petitioner controverted the statement in the pleading of the Bouchard Transportation Co. Inc., the opening statement of its counsel at the trial and the evidence adduced by Bouchard and the petitioner as to the circumstances surrounding the transaction.

It is assumed that since the principal question, involving the application of the New York Statute of Limitations in Admiralty, will be briefed at length between the petitioner and the respondent-impleaded, no useful purpose would be served by an extended argument directed to that subject by this respondent. Accordingly this brief will be directed to Point III of the petitioner's brief.

POINT I.

The decision of the Circuit Court upon the petition for a rehearing was correct.

The petition and the supporting brief fail to direct any argument against the pronouncement of the Circuit Court of Appeals in its decision upon the petition for rehearing in that Court.

Simply stated, the question is whether as to this respondent, the Court could when justice demanded, disregard its own rule. The Circuit Court has said that the failure to assign error or to apply in that Court for leave to amend the pleading could not preclude it from granting relief in a proper case. It wrote:

> "However, that is only a default in time, against which it is always possible for a court to relieve when justice demands" (p. 116 of Transcript).

In reaching that conclusion, the Court made reference to the Rule of Civil Procedure, 6(b) (2), which permits an enlargement of time by the Court where the failure to act was the result of excusable neglect. While the Rules of Civil Procedure have not been extended to admiralty, the Court pointed out that it conforms with the earlier practice of the courts of equity and that the rule of admiralty is no different.

There can be no question but that the facts hereinbefore reviewed and supported by the record, which was before the Circuit Court, establish that justice demanded that the libel be dismissed as to both respondents. No proof was required to show that the three year statute of limitations had expired before the action was instituted. No different or other evidence was necessary to the decision of the Circuit Court dismissing the libel as to both parties-respondent. The position assumed by petitioner and the other parties prior to and during the entire litigation and on appeal, that is, that the contract really was one between the petitioner and the Barge Corporation, resulted in the decision by the Circuit Court of Appeals dismissing the libel.

Having been defeated on an issue of law clearly and fully presented to the Circuit Court of Appeals as well as to the District Court, petitioner then sought to retrieve its loss by invoking an application of the rules of practice so strict as to preclude the Court from administering justice in the cause. This position was assumed in spite of the fact that the issues were framed by the pleadings and repeatedly presented by argument. The Circuit Court very properly declined to adopt petitioner's contention.

In *Re Boynton,* 24 Fed. Supp. 267, 269, it was said:

> "The ends of justice must not be sacrificed by too rigid attention to technical rules."

citing *Hardin et al.* v. *Boyd,* 113 U. S. 756, 5 S. Ct. 771, 28 L. Ed. 1141, and *Richmond* v. *Irons,* 121 U. S. 27, 7 S. Ct. 788, 30 L. Ed. 864.

In *Washington Southern Navigation Company* v. *Baltimore & Philadelphia Steamboat Company,* 263 U. S. 629, 635, 68 L. Ed. 480, 482, Mr. Justice BRANDEIS wrote:

> "The function of rules is to regulate the practice of the court and to facilitate the transaction of its business. This function embraces, among other things, the regulation of the forms, operation and effect of progress; and the prescribing of forms, modes and times for proceedings. Most rules are merely a formulation of the previous practice of the courts. Occasionally, a rule is employed to express, in convenient form, as applicable to certain classes of cases, a principle of substantive law which has been established by statute or decisions. But no rule of court can enlarge or restrict jurisdiction."

In *The Osburne,* 105 U. S. 447, 26 L. Ed. 1005, the contention was made that a rule of practice had been violated and that therefore the appeal must fail. This Court declined to entertain that contention, stating at page 450:

> "The rule of the District Court, requiring an appeal to be in writing and filed with the Clerk, could certainly be dispensed with by that Court. It simply prescribed a mode of proceeding to get an appeal."

See also,

Holmes v. *Ginter Restaurant Company,* 54 Fed. (2) 876 (C. C. A. 1);

Sun Oil Company v. *Gregory,* 56 Fed. (2) 108 (C. C. A. 1).

It has never been held, so far as the authorities disclose, nor is it presently argued in petitioner's brief, that

the Circuit Court of Appeals was without power, when justice demanded it, to waive its own rules. The case of *The Tommy,* cited at page 22 of petitioner's brief, does not change this well established rule. However, it should be pointed out that in that case the party held secondarily was a charterer, who had stipulated his secondary liability in the District Court and had not sought to be relieved of that stipulation at any time.

There can be no question but that the Circuit Court could notice an error not assigned and correct it to accomplish a just result.

> Rule X, Rules of United States Circuit Court of Appeals, Second Circuit.
> *Re Central Railroad of New Jersey,* 52 Fed. (2) 20, 22.

It is therefore respectfully submitted that the Circuit Court of Appeals, after reviewing the record, properly exercised its right to notice error and to dismiss the libel as to the respondent, Bouchard Transportation Co. Inc.

POINT II.

Petitioner has failed to show that this cause is one in which a writ of certiorari should issue.

Insofar as the respondent Bouchard is concerned no effort has been made by petitioner to show that the ends of justice require that this cause be reviewed.

From the brief review of the facts already presented in this brief, it is evident that the Circuit Court dismissed the libel as to Bouchard on issues arising out of facts which were peculiar to this case alone. These issues present no question of importance beyond this case, nor is it claimed by petitioner that the rule applied to this respondent by

the Circuit Court is at variance with the decisions of this Court or of the courts of other circuits.

The petition for rehearing was for the purpose of obtaining a specific indication in the order for mandate that the libel be dismissed only as to the Buffalo Barge and not as to Bouchard. The decision of the Circuit Court on the petition for rehearing was confined to that point and it properly applied the rules of practice and its own judicial power to effect a just determination of the cause. All the facts were before the Court and the question was fully briefed. In deciding the case the Circuit Court did not render a decision which is in conflict with the decisions of this Court or of the courts of other circuits, nor did it violate the principles which govern the administration of the admiralty law. Accordingly, since the Circuit Court applied its unquestioned powers to a state of facts peculiar to the suit before it, there is no showing of a cause for review by this Court.

An extended discussion of the principles which move this Court to extend its power of review is not required. No sound reason for doing so has been advanced by the petitioner, nor does the case fall within the scope of the principles enunciated by its rules which would persuade this Court to grant certiorari.

There is no question here of a conflict between state court decisions and Federal rule. The Circuit Court applied its own rule and judicial discretion to an admiralty cause and has rightly said:

> "Justice clearly demands that the Bouchard Company which was at best only secondarily liable, should not be compelled to pay a judgment from which the Buffalo Company has been excused" (p. 116 of Transcript).

POINT III.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Bouchard Transportation Co., Inc.